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No. 07-1383

IN THE SUPREME COURT OF THE UNITED STATES

SHOZDIJIJI SHISINDAY, a/k/a DANNY DEAN THOMAS,
Petitioner,
v.
NATHANIEL QUARTERMAN
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF FORENSIC PSYCHIATRISTS DR. DAVID LOWENTHAL, DR. JEREMY BUTLER AND DR. RICHARD DUDLEY AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE*

This brief is filed on behalf of forensic psychiatrists Dr. David Lowenthal, Assistant Clinical Professor of Psychiatry, Columbia University and Director, Washington Heights Community Service Inpatient Unit, New York State Psychiatric Institute; Dr. Jeremy Butler, Assistant Clinical Professor of Psychiatry, Columbia University, and Attending Psychiatrist at Mid-Hudson Forensic Psychiatric Center; and Dr. Richard Dudley, a psychiatrist in private practice and previously an Adjunct Associate Professor of Law at the New York University School of Law, who has testified as an expert in psychiatry in numerous criminal cases, including capital cases, throughout the country.[1] The signers have substantial expertise on the uses and effects of antipsychotic medication.

The recent decision of the United States Court of Appeals for the Fifth Circuit (the "Fifth Circuit"), in the matter of *ShisInday v. Quarterman*, 511 F.3d 514 (5th Cir. 2007), creates an exception to the rule that this Court announced in *Riggins v. Nevada*, 504 U.S. 127 (1992), by allowing the state to reuse transcript testimony from a previous trial where the defendant was unlawfully medicated in violation of *Riggins*. The *Riggins* rule defines the process by

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici curiae* and their counsel made any monetary contribution to the preparation or submission of this brief. Letters of consent to the filing of this brief from both parties have been filed with the Clerk of the Court.

which a court determines whether to allow the state to forcibly medicate a criminal defendant with antipsychotic medication in order to render him competent to stand trial. Forensic psychiatrics play a central role in this process by, among other things: (1) informing the court about the mental state of mentally ill defendants, (2) prescribing appropriate treatments for such defendants, and (3) explaining how those treatments, including medications, are likely to affect such defendants. As forensic psychiatrists, we have a special interest in this matter both because of the central role forensic psychiatry plays in hearings required by *Riggins* and because the *Riggins* rule protects the constitutional rights of our patients.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court has declared that "an individual has a constitutionally protected liberty 'interest in avoiding involuntary administration of antipsychotic drugs' -- an interest that only an 'essential' or 'overriding' state interest might overcome." *Sell v. United States*, 539 U.S. 166, 178-79 (2003) (quoting *Riggins*, 504 U.S. at 134-35). The *Riggins* rule is designed to protect the constitutionality and integrity of the process by which courts determine whether a state may forcibly medicate a criminal defendant with antipsychotic medication in order to render him competent to stand trial. *Id.* This Court has instructed that when a state seeks to medicate a criminal defendant against his will, it must make specific showings of necessity and medical appropriateness. *Id.* at 180. That determination

requires that the court consult with psychiatrists regarding the state of defendant's mental health, whether forcible medication may help accomplish the state's objective, the appropriate medication and dose, and the possible side effects that the defendant may suffer if medicated. *Id.* at 180-81.

Petitioner's initial conviction and death sentence were vacated by a federal district court, which held that the trial court had allowed the state to forcibly medicate Petitioner without taking the required measures to determine whether such medication was necessary or appropriate. *Thomas v. Johnson*, Civ. No. H-95-5236 (S.D. Tex. July 2, 1997) (Black J.). In Petitioner's second trial, the trial court allowed the state to admit, over the defense's objection, into evidence testimony from Petitioner's first trial, despite the holding of the federal district court that this testimony had been tainted by a *Riggins* violation. *ShisInday*, 511 F.3d at 523. Applying a "harmless error" analysis, the Fifth Circuit denied Petitioner's application for a Certificate of Appealability on this issue. *Id.* at 524.

In *Riggins*, this Court instructed that a defendant who is forcibly medicated without the required findings of necessity and appropriateness need not show harm to be entitled to a new trial. *Riggins*, 504 U.S. at 137. This holding reflects the Court's recognition that it is impossible to measure the harm that inappropriate medication can have on a defendant's trial. *Id.* In addition, the fact that a defendant does not need to show harm provides the state with a strong incentive to comply with *Riggins*' requirements. The deterrent power and effectiveness of the *Riggins* rule, however, will be significantly

diminished if trial courts allow states to admit at subsequent trials – ordered because of a *Riggins* violation – evidence that the state elicited in violation of *Riggins*.

By granting certiorari to the petition at issue, the Court can provide appellate courts with a standard by which to review trial courts' decisions to admit *Riggins*-tainted evidence. A standard that provides that such grave constitutional violations are never tolerated, or tolerated only in very limited and specific circumstances, will help preserve the integrity and effectiveness of the *Riggins* rule.

ARGUMENT

We do not, in this brief, take a stand on whether the Court should ultimately hold for or against Petitioner, if certiorari is granted. The sole purpose of this brief is to encourage the Court to grant the petition at issue so that the Court can announce a standard of review that will protect the important rule that it announced in *Riggins*.

A. Use and Effect of Antipsychotic Medication

As long recognized by this Court, antipsychotic medication plays a critical, often indispensable, role in treating criminal defendants who, due to mental illness, are dangerous to themselves or others. *See Washington v. Harper*, 494 U.S. 210 (1990). Antipsychotic medication also plays a central role in restoring or maintaining the competence of mentally

ill defendants so they can stand trial. *See Sell*, 539 U.S. 166.

But "[w]hile the therapeutic benefits of antipsychotic drugs are well documented, it is also true that the drugs can have serious, even fatal, side effects." *Riggins*, 504 U.S. at 134. Common side effects such as sedation or over-sedation (which can cause a person to be sluggish or induce sleep) and tardive dyskinesia,[2] may "interfere with the defendant's ability to receive a fair trial." *Sell*, 539 U.S. at 179 (noting Justice Kennedy concurring opinion in *Riggins*).

Since this Court decided *Riggins*, new types of antipsychotic medications have been introduced that may have fewer acute side effects than the drugs used when *Riggins* was decided. *See United States v. Gomes*, 289 F.3d 71, 83 (2d Cir. 2002); *States v. Weston*, 255 F.3d 873, 877 n.3 (D.C. Cir. 2001). Nevertheless, the older medications are still widely used. J. Parks, *et al., Principles of antipsychotic prescribing for policy makers, circa 2008. Translating knowledge to promote individualized treatment*, Schizophrenia Bul. 2008.[3] Moreover, the risk of

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[2] "Tardive dyskinesia is a neurological disorder, irreversible in some cases, that is characterized by involuntary, uncontrollable movements of various muscles, especially around the face." *Riggins*, 504 U.S. at 134.

[3] *See also L. Shi, et al., Characteristics and Use Patterns of Patients Taking First-Generation Depot Antipsychotics or Oral Antipsychotics for Schizophrenia*, Psychiatric Service 58:482-488, Apr. 2007. This is especially true in prisons and jails, where cost considerations typically lead to a greater use of first-generation medication. *See* B. Veysey, *et al., Costs, Control or Just Good Clinical*

undesirable side effects, which may compromise a defendant's right to a fair trial, is still considerable, whether an individual is medicated using one of the new antipsychotic medications or one of the older ones. *See Developments in the Law -- The Law of Mental Illness*, 121 Harv. L. Rev. 1121, 1132 (2008); *Schizophrenia*, U.S. Dept. of Health and Human Services, Nat'l Inst. Mental Health, NIH Pub. No. 06-3517, p. 10 (Revised Jan. 2007).[4] This is especially true given the wide variation in clinical responses to the array of available antipsychotic medications, both in terms of the specific medication and the prescribed dose. *Id.* In other words, while one individual may have a therapeutic response to a relatively high dose of one medication, another individual may have an adverse response to a relatively low dose of the same medication.

B. The Right to Refuse Antipsychotic Medication

This Court has declared that a criminal defendant "has a constitutionally protected liberty

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Practice? The Use of Antipsychotic Medications and Formulary Decision-Making in Large U.S. Prisons and Jails, J. of Offendor Rehabilitation, Vol. 45, No. 1-2, pp. 189-206(18), Jan. 2008.

[4] *See also* R. Keefe, *et al.*, *Neurocognitive Effects of Antipsychotic Medications in Patients with Chronic Schizophrenia in the CATIE Trial.* Arch. Gen. Psychiatry 64(6):633-47, Jun. 2006; J. Ananth, S. Parameswaran, S. Gunatilake, *Side Effects of Atypical Antipsychotic Drugs*, Current Pharmaceutical Design, Volume 10, No. 18, pp. 2219-2229, Jul. 2004.

interest in avoiding involuntary administration of antipsychotic drugs." *Sell*, 539 U.S. at 178-79 (quoting *Riggins*, 504 U.S. at 134-35). This right protects the defendant's legitimate desire to avoid the risk of the potentially debilitating side effects, caused by antipsychotic medication, which could "interfere with the defendant's ability to receive a fair trial." *Id.* at 179. For example, an over-sedated defendant, who is continually nodding off and fighting just to stay awake, would have a great deal of difficulty following the proceedings, providing assistance to his counsel, and responding to potentially damaging testimony by prosecution witnesses. This right also protects the privacy and liberty of the defendant's body, as "the forcible injection of medication into a nonconsenting person's body [ ] represents a substantial interference with that person's liberty." *Riggins*, 504 U.S. at 134 (quoting *Harper*, 494 U.S. at 229).

The constitutional right of a criminal defendant to resist antipsychotic medication is not without limits. There are circumstances in which involuntary medication is permissible and appropriate. For example, forcible medication is appropriate where the state demonstrates "by a medical finding" that a person in custody has a mental disorder which is likely to cause harm to himself or others, unless medicated with the proper dose of antipsychotic medication. *Sell*, 539 U.S. at 178 (quoting *Harper*, 494 U.S. at 221-22). Involuntarily medication is also warranted when it is the only means by which "a mentally ill defendant facing serious criminal charges" can be rendered competent to stand trial. *Id.* at 179.

C. The *Riggins* Rule

The rule that this Court announced in *Riggins* is designed to ensure that a defendant's "constitutionally protected liberty interest in avoiding involuntary administration of antipsychotic drugs" will only be compromised if forcible medication is medically appropriate and is necessary to further an overriding state interest. *Sell*, 539 U.S. at 178-79. In *Sell*, the most recent decision by this Court to address a *Riggins* issue, this Court reaffirmed that the Constitution permits a state to involuntary medicate "a mentally ill defendant facing serious criminal charges in order to render that defendant competent to stand trial." *Id.* at 179. However, in order to do so the state must demonstrate that "the treatment is medically appropriate, is substantially unlikely to have side effects that may undermine the fairness of the trial, and, taking account of less intrusive alternatives, is necessary significantly to further important governmental trial-related interests." *Id.*[5]

A defendant who suffered a *Riggins* violation does not need to show harm to be entitled to a new trial. *Riggins* at 137. The *Riggins* court explained that:

> Efforts to prove or disprove actual prejudice from the record before us would be futile, and guesses whether the outcome of the trial might have been different if Riggins' motion had

[5] A lesser standard applies where the state's goal is to contain or control a violent person in its custody. *Sell*, 539 U.S. at 181-82.

> been granted would be purely speculative. We accordingly reject the dissent's suggestion that Riggins should be required to demonstrate how the trial would have proceeded differently if he had not been given [the antipsychotic medication] Mellaril.

Id.

D. The Circumstances of the Case at Issue

Petitioner is a death-row inmate from Texas with a long and unfortunate history of mental illness. *ShisInday*, 511 F.3d at 517, 519. During his first capital murder trial, in 1982, Petitioner was treated with Prolixin Decanoate,[6] a "highly potent behavior modifier with a markedly extended duration of effect." *Harper*, 494 U.S at 257. Prolixin is a very effective drug when administered properly and is still in use today.[7] Petitioner argues that, as a result of the medication, he suffered from over-sedation. Petition for Writ of Certiorari at 7-8. Sedation is one of the more common side effects of Prolixin and certain other antipsychotic drugs. *See* Arana G. *An Overview of Side Effects Caused by Typical Antipsychotics*, J. of Clinical Psychiatry, 61 Supp.

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[6] *See* Appendix H to the Petition for Writ of Certiorari.

[7] *See* L. Shi, *et al., Characteristics and Use Patterns of Patients Taking First-Generation Depot Antipsychotics or Oral Antipsychotics for Schizophrenia*, Psychiatric Service 58:482-488, Apr. 2007.

8:5-11, 2000.[8] Over-sedation can be a side-effect or the result of improper administration of the medication.

In 1997, U.S. District Judge Norman Black of the Southern District of Texas vacated Petitioner's conviction and death sentence. *Thomas*, Civ. No. H-95-5236. He held that the trial court had erred when it allowed the state to forcibly medicate Petitioner without taking measures to determine whether the forcible medication prescribed was medically appropriate, necessary to accomplish an important state objective, and whether such objective could have been accomplished via less intrusive means. *Id.*

Petitioner was retried in 1998. *ShisInday*, 511 F.3d at 519. During his second trial, the court allowed, over the defense's objection, the state to admit into evidence testimony from Petitioner's first trial, despite the holding of the federal district court that Petitioner's first trial, including this testimony, was tainted by a *Riggins* violation. *Id.* at 523. At the end of the second trial, Petitioner was again convicted of capital murder and sentenced to death. *Id.* at 519-20.

Petitioner then filed a habeas petition with the federal district court on various grounds, including the admission of the *Riggins*-tainted evidence into the record. (Petitioner's application for federal habeas corpus was not heard by the judge who had vacated his original conviction on *Riggins* grounds as Judge Black had passed away.) Petitioner's application for

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[8] *See also Adverse Effects of the Atypical Antipsychotics*, J. of Clinical Psychiatry, 59 Supp. 12:17-22, 1998.

habeas corpus arising from his second trial was rejected in its entirety by the federal district court, which held that the admission of the *Riggins*-tainted evidence was "harmless error." *ShisInday v. Quarterman*, Civ. No. H-06-814, 2007 U.S. Dist. LEXIS 17099, at *53-56 (S.D. Tex., Mar. 9, 2007). However, this Court held that the supposed harmlessness of the error does not excuse a *Riggins* violation in a capital case. *See supra*, p. 7. The Fifth Circuit denied Petitioner's request for a Certificate of Applicability, adopting the holding of the district court in whole. *Id.* at 524.

E. The Need for a Standard Regarding Admissibility of *Riggins*-Tainted Evidence

The Fifth Circuit's decision in this case is troubling because it indicates that a state may be able to circumvent the purpose of the *Riggins* rule by introducing evidence elicited by a *Riggins* violation in a subsequent trial. In addition, the manner by which the state and reviewing courts handled the admission of the *Riggins*-tainted evidence suggests a lack of respect for the purpose and requirements of the rule this Court announced in *Riggins*.

Even after Petitioner's conviction was vacated because of a *Riggins* violation, the state sought to admit *Riggins*-tainted evidence into the record. In direct contravention of the federal district court's ruling, the trial court summarily permitted the admission of this evidence. In its review, the Fifth Circuit did not even address the fact that the constitutional error committed by the trial court was

the precise error, involving the exact same *Riggins* violation, which necessitated a second trial.

This Court has yet to declare the standard by which an appellate court should review trial errors concerning the admission of *Riggins*-tainted evidence. As psychiatrists, it is not our place to suggest to the Court the proper standard of judicial review. However, because the *Riggins* rule is critical to the field in which we practice and to the rights of the patients we treat, we have an interest that the standard that this Court chooses be a rigorous one that mandates compliance with the requirements of *Riggins*.

CONCLUSION

For the reasons described above, the petition for a writ of certiorari should be granted.

Dated: June 6, 2008

Respectfully submitted:

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